IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHARLES and PATTY EVERTS, husband and wife, Plaintiffs/Appellees, v. JOHN A. ENGLE, an unmarried man; COMPASS ROSE DEVELOPMENT, INC., a Nevada corporation; and KEYSTONE CUSTOM CONSTRUCTION, L.L.C., an Arizona limited liability company, Defendants/Appellants.	2 CA-CV 2006-0222 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20061923

Honorable Deborah Bernini, Judge

VACATED AND REMANDED

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P E L A N D E R, Chief Judge.

¶1 In this land-use dispute, the trial court granted summary judgment in favor of plaintiffs/appellees Charles and Patty Everts, permanently ordering defendants/appellants John Engle, Compass Rose Development, Inc., and Keystone Custom Construction, L.L.C. (collectively "Engle") to comply with a restrictive covenant running with property the Evertses sold to Engle. On appeal, Engle argues the trial court misapplied our supreme court's decision in *Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006), and erred by considering the Evertses' intent and other matters outside the covenant in interpreting and enforcing it. Engle also asserts the court erroneously found he was equitably estopped from challenging the validity of the covenant.

¶2 For the reasons set forth below, we conclude the trial court erred in finding, as a matter of law, that Engle was equitably estopped and, therefore, vacate the summary judgment entered in favor of the Evertses. But, because the Evertses presented additional claims on which the trial court did not rule and which might raise triable issues of fact, we reject Engle's request that we direct entry of summary judgment in his favor. Accordingly, we remand the case for further proceedings.

Background

¶3 On appeal from a summary judgment, we view the facts and reasonable inferences therefrom in the light most favorable to the non-prevailing party. *Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, ¶ 10, 36 P.3d 1200, 1203 (App. 2001). In June 1999, the Evertses purchased a residence in Desert Moon Estates and an immediately adjacent,

undeveloped lot located in a separate subdivision, Esperero Canyon Estates ("Esperero"), and designated as Esperero Lot 16. They paid $160,000 for Lot 16.

¶4 In July 2001, the Evertses listed Lot 16 for sale for $239,000. That same month, they had drafted and recorded a document entitled "Covenant Running with the Land" ("Evertses' covenant"). The covenant states that its restrictions and conditions "shall run with title to Lot 16 and shall bind all parties having or acquiring any right, title or interest in Lot 16." As the owners of both parcels of land, the Evertses burdened themselves and all subsequent owners of Lot 16 while benefitting their property in Desert Moon Estates. The Evertses did not seek approval from the Esperero Canyon Homeowners Association (ECHA) board of directors before recording the covenant, even though Esperero's covenants, conditions, and restrictions (CC&Rs) declare "null and void" any other covenants or restrictions recorded against an Esperero lot without the board's prior approval.

¶5 In April 2002, Engle purchased Lot 16 from the Evertses for $232,000. At that time, the Evertses' covenant was still of record on the property, and their real estate agent avowed she had given a copy of the covenant to both Engle's agent and Engle himself. Engle began designing a residence for the property in 2004, seeking approval from Esperero's architectural review committee and the Pima County Regional Flood Control District. Both bodies approved the design plans.

¶6 In 2006, Engle transferred ownership of Lot 16 to Keystone Custom Construction, L.L.C. ("Keystone") and Compass Rose Development, Inc. ("Compass"), in

which Engle owns an interest. When he began clearing the land, the Evertses filed this action, petitioning for a temporary restraining order (TRO) and injunctive relief against Engle's planned construction of a residence, which, they alleged, would violate their restrictive covenant. The court issued but later struck a TRO for failure to name the proper defendants, but it allowed the Evertses to amend their complaint to add Compass and Keystone, which they then did.

¶7 In their amended complaint, the Evertses alleged claims for breach of contract and breach of the covenant of good faith and fair dealing and also sought injunctive relief to stop Engle's construction on Lot 16. Specifically, the Evertses claimed that Engle's construction plans violated the covenant's provisions that prohibit building in the private drainage easements and that restrict the location and height of any garage. The Evertses also included a claim for rescission, alleging that Engle had materially misrepresented that he would comply with the covenant and had thereby induced them into selling Lot 16 to him. Engle counterclaimed and sought a declaratory judgment that the Evertses' covenant was null and void because they had failed to seek ECHA board approval before recording the document, as Esperero's CC&Rs required.

¶8 On the parties' cross-motions for summary judgment filed below, the trial court denied Engle's motion and granted the Evertses', ordering Engle to comply with the Evertses' covenant as interpreted by the court in its ruling. The court also ruled as a matter of law that Engle was equitably estopped from invoking as a defense Esperero's CC&Rs.

This appeal followed the court's entry of judgment, in which it also awarded attorney fees to the Evertses.

Discussion

¶9 Engle contends the trial court erred in granting summary judgment in favor of the Evertses by "enforc[ing] a number of restrictions . . . that were not contained in the plain language" of the covenant. He also challenges the court's ruling that he was equitably estopped as a matter of law from seeking to invalidate the Evertses' covenant based on their own failure to comply with Esperero's CC&Rs.

¶10 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "We independently determine whether questions of material fact exist and whether the superior court properly applied the law." *DeSilva v. Baker*, 208 Ariz. 597, ¶ 10, 96 P.3d 1084, 1087 (App. 2004). "As a general rule if both parties file opposing motions for summary judgment, the court is not constrained to grant either motion if a genuine issue of material fact exists." *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 161 Ariz. 420, 424, 778 P.2d 1316, 1320 (App. 1989), *rev'd on other grounds*, 165 Ariz. 31, 796 P.2d 463 (1990).

¶11 We review a trial court's granting of injunctive or other equitable relief, including its application of estoppel principles, for an abuse of discretion. *See Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, ¶ 27, 156 P.3d 1149, 1155 (App.

2007). "A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion . . . or [if] 'the record fails to provide substantial evidence to support the trial court's finding.'" *Id., quoting Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982).

I.

¶12 As noted above, the trial court ruled that Engle was legally precluded from asserting that Esperero's CC&Rs invalidated the Evertses' covenant. We address that issue first because we find it largely dispositive of this appeal. Restrictive covenants contained in CC&Rs create "'a contract between the subdivision's property owners as a whole and individual lot owners.'" *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, ¶ 14, 75 P.3d 132, 135 (App. 2003), *quoting Horton v. Mitchell*, 200 Ariz. 523, ¶ 8, 29 P.3d 870, 872 (App. 2001), *quoting Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (1993); *see also Powell*, 211 Ariz. 553, ¶ 8, 125 P.3d at 375 ("A deed containing a restrictive covenant that runs with the land is a contract."). Similarly, a "grantee who accepts a deed containing restrictive covenants has entered into a contractual relationship." *Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983).

¶13 "The interpretation of a contract is generally a matter of law." *Powell*, 211 Ariz. 553, ¶ 8, 125 P.3d at 375; *see also Johnson v. Pointe Cmty. Ass'n*, 205 Ariz. 485, ¶ 23, 73 P.3d 616, 621 (App. 2003). Therefore, "[w]e interpret written CC & Rs *de novo* where, as here, there is no extrinsic evidence of the drafter's intent." *Gfeller v. Scottsdale*

Vista North Townhomes Ass'n, 193 Ariz. 52, ¶ 7, 969 P.2d 658, 659 (App. 1998); *see also Wilson v. Playa de Serrano*, 211 Ariz. 511, ¶ 6, 123 P.3d 1148, 1150 (App. 2005) ("interpret deed restrictions de novo").

¶14 The Esperero CC&Rs provide: "[n]o further covenants, conditions, restrictions or easements shall be recorded by any Owner, or other person against any Lot without the provisions thereof having been first approved in writing by the Board and any covenants, conditions, restrictions or easements recorded without such approval being evidenced thereon shall be null and void." In his counterclaim below, Engle relied on that provision to seek declaratory relief, asking the trial court to find the Evertses' covenant null and void and, therefore, unenforceable. Similarly, he asserted in his motion for summary judgment that the Evertses could not enforce their covenant because they admittedly had failed to obtain approval of ECHA's board before recording it, in direct violation of Esperero's CC&Rs.[1]

¶15 In response, the Evertses argued that Engle had cited no authority to support his attempt to "vitiate[] . . . an enforceable contract" between the Evertses and him based

[1]In their answering brief, the Evertses point out that Esperero Canyon Homeowners Association (ECHA) was not a party and "even refused to take a position in this case." Engle attached to his reply brief a board resolution declaring the Evertses' covenant null and void, but that occurred a few months after the trial court's ruling. Because we may only consider the evidence presented below, we do not consider that new submission. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). In addition, "[o]n appeal from summary judgment, the appellant may not advance new theories or raise new issues to secure a reversal." *Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992); *see also Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 950 (App. 2004).

on Esperero's CC&Rs. The Evertses also contended Engle was equitably estopped from invoking the CC&Rs as a defense. In addition, the Evertses asserted that Engle had waived any right to rely on the CC&Rs by taking title to Lot 16 with actual knowledge of the Evertses' covenant and, at a minimum, with constructive notice of the CC&Rs. Similarly, the Evertses argued that ECHA had waived any claim that their covenant was invalid by previously failing to challenge, despite the absence of any board approval, at least ten recorded covenants or easements on other Esperero lots. Finally, the Evertses argued that if Engle was entitled to assert Esperero's CC&Rs as a defense to their claims in this case, "then there has been a failure of consideration and frustration of contractual purpose that gives rise to the remedy of rescission."

¶16 Without addressing any issues relating to waiver or rescission, the trial court rejected Engle's argument on two grounds. First, the court ruled that he could not "legally assert [the CC&Rs] to vitiate [his] contractual obligations to [the Evertses]," noting that "[t]he contract between [the parties] was a valid, binding agreement that included the Covenant as one of its terms." Second, the court found "as a matter of law that [Engle was] equitably estopped from invoking the terms of the [CC&Rs] as a defense."

II.

¶17 As he did below, Engle argues the Evertses' covenant "is null and void, and the trial court erred in finding it valid and enforceable." It is undisputed that the Evertses failed to obtain ECHA's approval of their covenant before recording it, and the covenant

itself does not reflect any such approval. Therefore, Engle asserts, the covenant "is of no force or effect."

¶18 We agree with Engle that neither ground of the trial court's ruling is legally supportable. With respect to the first ground, he argues that the court's reasoning that "a null and void contract for some purposes is not null and void for others . . . is contrary to black letter law." In support of the trial court's ruling, however, the Evertses assert that CC&Rs, "a private contractual arrangement between homeowners," cannot be used to "wipe out a separate and different private contract between a homeowner and an outsider." Engle, however, was not merely "an outsider," but rather became subject to the benefits and burdens of Esperero's CC&Rs when he purchased property (Lot 16) within that subdivision from the Evertses. *See Shamrock*, 206 Ariz. 42, ¶ 14, 75 P.3d at 135 (CC&Rs are contract between subdivision's property owners as a whole and individual lot owners); *cf. McRae v. Lois Grunow Mem'l Clinic*, 40 Ariz. 496, 503, 14 P.2d 478, 480-81 (1932) (each purchaser of lot in subdivision subject to "the benefits and burdens" of restrictive covenants, which "may be enforced by the owner of any lot in such tract against the owner of any other lot"). Individual lot owners such as Engle are "entitled to enforce" a subdivision's CC&Rs. *Horton*, 200 Ariz. 523, ¶ 10, 29 P.3d at 873.

¶19 Moreover, the Esperero CC&Rs clearly prohibit recording of additional restrictive covenants without prior, written board approval and declare "null and void" any covenants "recorded without such approval." The Evertses do not suggest, nor do we find, that provision is somehow ambiguous or confusing. "Words in a restrictive covenant must

be given their ordinary meaning, and the use of the words within a restrictive covenant gives strong evidence of the intended meaning." *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, ¶ 13, 87 P.3d 81, 84 (App. 2004); *see also Horton*, 200 Ariz. 523, ¶ 17, 29 P.3d at 874. In addition, "[u]nambiguous provisions in restrictive covenants will generally be enforced according to their terms." *Burke*, 207 Ariz. 393, ¶ 22, 87 P.3d at 86.

¶20 The word "null" generally means "[h]aving no legal effect; without binding force." *Black's Law Dictionary* 1098 (8th ed. 2004). Similarly, the word "void" is defined as "[o]f no legal effect; null." *Id*. at 1604. Although considered "a common redundancy," *id*. at 1098, the phrase "'[n]ull and void' means that which binds no one or is incapable of giving rise to any rights or obligations under any circumstances, or that which is of no effect." *Black's Law Dictionary* 962 (5th ed. 1979). According to its plain terms, then, Esperero's CC&Rs prevent the Evertses' covenant from having any validity, legal force, or binding effect because of the Evertses' failure to obtain prior approval of ECHA's board before recording it.

¶21 Notwithstanding the plain language in the CC&Rs and the Evertses' failure to comply with them, the trial court ruled that Engle could not rely on the CC&Rs "to vitiate [his] contractual obligations" to the Evertses under their "valid, binding agreement that included the Covenant." But the court cited no authority for that proposition, nor do the Evertses on appeal. "The enforcement of restrictive covenants through an injunction is not a matter of right, but is governed by equitable principles." *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 9, 2 P.3d 1276, 1280 (App. 2000). And, "'[o]ne

who seeks equity must do equity.'" *Id.* ¶ 20, *quoting Ariz. Coffee Shops v. Phoenix Downtown Parking*, 95 Ariz. 98, 100, 387 P.2d 801, 802 (1963) (alteration in *Ahwatukee*). In view of the Evertses' utter disregard of Esperero's CC&Rs in recording their covenant without prior ECHA board approval, we cannot say equitable, injunctive relief for them was warranted or appropriate.

¶22 Though not cited by the parties, *La Esperanza Townhome Ass'n v. Title Security Agency*, 142 Ariz. 235, 689 P.2d 178 (App. 1984), is instructive on this issue. In that case, this court held that a 1975 amendment to CC&Rs and a 1980 revised subdivision plat "were null and void" because they did not uniformly change the CC&Rs, but rather, "purport[ed] to affect only part of the lots in the subdivision." *Id*. at 237, 689 P.2d at 180. Accordingly, we reversed the trial court's contrary ruling and directed entry of judgment in favor of the plaintiffs/landowners, declaring that the amendment and revised plat were invalid. *Id*. at 240, 689 P.2d at 183.

¶23 The primary defendant in *La Esperanza* was a developer who had acquired multiple townhome lots in the subdivision after the CC&R amendment had been recorded. He argued "that when the landowners who are now members of the plaintiff association purchased their property, they did so after the year 1975, after the amendment, and did not therefore, rely on the original restrictions and therefore cannot now object." *Id*. at 239, 689 P.2d at 182. In rejecting that argument, this court stated:

> Amendments which are not properly executed never become effective. When the purchasers bought the property after the 1975 amendment they did so subject to the void amendment. Their mere purchase of the property did not operate to validate

> a document that never took effect. Nor can we say that the mere purchase of the property with the 1975 amendment of record induced [the defendant], who testified he would never have purchased the property if he had known that the 1975 amendment was invalid, to act to his detriment. In fact, there was some burden upon [the defendant], who was going to commercially develop the property, to make sure that there were no impediments that would adversely affect his goals. The 1975 amendment, although not invalid on its face, raised a red flag since it purports to change the restrictions on only a portion of the subdivision. Had [he] further investigated, he would have discovered that not all of the landowners had agreed to the amendment and that it was null and void.[2]

Id. at 239-40, 689 P.2d at 182-83 (citation omitted).

¶24 Much of the same reasoning applies here to support Engle's argument and undercut the trial court's ruling. The Evertses were bound by Esperero's CC&Rs with respect to Lot 16 when they owned it, and they disregarded that document at their peril. They obviously were aware of the CC&Rs because they specifically referred to them in their own private covenant. Just as the plaintiffs/landowners in *La Esperanza* were not precluded from relying on the original CC&Rs even though they bought their properties after the 1975 amendment had been recorded, we see no legal reason why Engle cannot rely on Esperero's CC&Rs even though he bought Lot 16 subject to the Evertses' recorded covenant. And, just as the 1975 amendment in *La Esperanza* "never bec[a]me effective" and was "null and void" because it was "not properly executed," *id*. at 239-40, 689 P.2d at 182-83, unless the

[2]Earlier in its opinion, this court also noted a question existed "as to whether the [1975] amendment was signed by the requisite number of landowners," and later observed that the defendant's new, 1980 plat "was invalid" because "there was no instrument signed by 90 percent of the lot owners." *La Esperanza Townhome Ass'n v. Title Sec. Agency*, 142 Ariz. 235, 237, 240, 689 P.2d 178, 180, 183 (App. 1984).

Evertses can establish waiver or a legal right to rescission (*see* ¶¶ 43-45, *infra*), Esperero's CC&Rs render the Evertses' covenant null and void based on their failure to comply with its preapproval requirement.

III.

¶25 This brings us to the second ground on which the trial court ruled against Engle—equitable estoppel. In ruling as a matter of law that he was equitably estopped from invoking Esperero's CC&Rs as a defense, the trial court stated:

> Engle purchased Lot 16 with actual notice of the Covenant and at a price below market value that reflected the existence of building restrictions on the Lot. [The Evertses] relied on Engle's acceptance of the terms of the Covenant when they sold the Lot to Defendant Engle. A party to a contract cannot take advantage of [a] term, remain quiet about its applicability and then assert that the term is unenforceable or null on its face after receiving the benefit of that term.

¶26 Engle challenges that ruling, particularly as it pertains to Compass and Keystone.[3] Again, we review de novo the trial court's granting of summary judgment. *See DeSilva*, 208 Ariz. 597, ¶ 10, 96 P.3d at 1087. "Similarly, the determination of whether equitable relief is available and appropriate is subject to our de novo review." *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003); *cf. Flying Diamond Airpark*, 215 Ariz. 44, ¶ 27, 156 P.3d at 1155 ("We review a trial court's decision not to apply estoppel for an

[3]Without citing any authority, Engle argues Compass and Keystone, "the current owners of Lot 16[,] cannot be equitably estopped from asserting the Esperero [CC&Rs] as a defense" because "they did not purchase Lot 16 from the Everts[es]." We do not address that argument because Engle failed to raise it below. *See Airfreight Express, Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007); *see also Lansford*, 174 Ariz. at 419, 850 P.2d at 132.

abuse of discretion," which can occur if a court "commits an error of law in reaching a discretionary conclusion.").

¶27 The purpose of equitable estoppel is to promote "'the ends of justice, and the doctrine is grounded on equity and good conscience.'" *Bartholomew v. Superior Court of Pima County*, 4 Ariz. App. 50, 52, 417 P.2d 563, 565 (1966), *citing* 31 C.J.S. *Estoppel* § 63 (1964). "A claim for estoppel arises when one by his acts, representations or admissions intentionally or through culpable negligence induces another to believe and have confidence in certain material facts and the other justifiably relies and acts on such belief causing him injury or prejudice." *St. Joseph's Hosp. and Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 317, 742 P.2d 808, 818 (1987). The three elements required to show equitable estoppel are: "(1) affirmative acts inconsistent with a claim afterwards relied upon; (2) action by a party relying on such conduct; and (3) injury to the party resulting from a repudiation of such conduct." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 10, 96 P.3d 530, 537 (App. 2004); *see also Flying Diamond Airpark*, 215 Ariz. 44, ¶ 28, 156 P.3d at 1155. The Evertses bore the burden of establishing all three of those elements by "'clear and satisfactory'" proof. *Facit-Addo, Inc. v. Davis Fin. Corp.*, 134 Ariz. 6, 10, 653 P.2d 356, 360 (App. 1982), *quoting Desert Vista Apartments, Inc. v. O'Malley Lumber Co.*, 103 Ariz. 23, 25, 436 P.2d 479, 481 (1968).

¶28 With respect to the first prerequisite for equitable estoppel, Engle contends "the Everts[es] cannot show an 'affirmative act' upon which they relied to their detriment," and, at the very least, a trier of fact should resolve the issue because an estoppel claim

generally involves a fact-intensive inquiry. According to Engle, "[t]he mere purchase of []Lot 16 cannot constitute an 'act' triggering a claim for equitable estoppel." He further asserts the trial court ignored factual disputes about the value of Lot 16 when it determined that "Engle purchased Lot 16 with actual notice of the Covenant and at a price below market value that reflected the existence of building restrictions on the Lot."[4]

¶29 To establish actual notice, the Evertses presented evidence that their real estate agent had given Engle and his real estate agent a copy of the covenant before he purchased the lot. The Evertses also claimed Engle signed a "Seller's Property Disclosure Statement" in which he acknowledged having received a copy of the covenant at the time of purchase. Although Engle admits that his agent received a copy of the covenant before he purchased the lot, he does not acknowledge personally having received a copy. But whether he personally did or did not, "notice to an agent acting within the scope of his authority is considered to be notice to his principal." *Colonial Villas, Inc. v. Title Ins. Co.*, 145 Ariz. 590, 592, 703 P.2d 534, 536 (App. 1985); *see also Gen. Factors, Inc. v. Beck*, 99 Ariz. 337, 340, 409 P.2d 40, 43 (1966). Therefore, no genuine issue of material fact exists on whether Engle had actual notice of the covenant before he purchased Lot 16.[5]

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[4]We agree with Engle that the record reflects genuine issues of material fact on whether he actually purchased Lot 16 "at a price below market value." Even assuming the trial court's factual finding on that point was not indispensable to its ultimate ruling, as the Evertses contend, we find the equitable-estoppel doctrine inapplicable for other reasons we discuss.

[5]We also note that, even if Engle did not have actual notice of the covenant before he purchased Lot 16, at a minimum he had constructive notice of it based on its having been properly recorded. *See* A.R.S. § 33-416 ("The record of a grant, deed or instrument in

writing authorized or required to be recorded, which has been duly acknowledged and recorded in the proper county, shall be notice to all persons of the existence of such grant,

¶30 Nonetheless, we agree with Engle that the type of affirmative act required to satisfy the first element of equitable estoppel is lacking here. The record does not reflect that Engle said or did anything to cause the Evertses to believe he would overlook or not attempt to enforce Esperero's CC&Rs in protecting his own property rights and seeking to use Lot 16 in whatever manner those CC&Rs permitted. The Evertses, however, assert the first element is established by Engle's "affirmative act of closing the deal with actual notice of the Covenant but while remaining quiet about any objections he might have had about it." According to the Evertses, "Engle's acceptance of the Covenant as part of the transaction to buy Lot 16," without ever "protest[ing] or request[ing] an explanation of the Covenant," is sharply inconsistent with his subsequent claim that the covenant is null and void.

¶31 In support of their contentions, the Evertses rely on *Holmes v. Graves*, 83 Ariz. 174, 318 P.2d 354 (1957). In that case, a grocer kept a charge account for some customers, recording the total of each sale on a notepad rather than in an itemized list of goods bought. *Id*. at 176, 318 P.2d at 355. When the grocer sued the customers for payment on the open account, they demanded an itemized accounting of each sale and relied on a civil procedure rule to argue that the trial court should disregard any evidence of the debt if the grocer could not provide such an accounting. *Id*. at 176-77, 318 P.2d at 356. In rejecting the customers' argument on appeal, the supreme court reasoned that they were

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deed or instrument."); *see also Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166 Ariz. 383, 387, 803 P.2d 104, 108 (1990) (successor in interest has constructive notice of any equitable covenant properly recorded).

equitably estopped from asserting the procedural rule when they had never previously objected to the grocer's accounting method. *Id*. at 178, 318 P.2d at 356.

¶32 In our view, the affirmative act of Engle's having closed on the purchase of Lot 16 bears no resemblance to the conduct of the defendants/customers in *Holmes*. "[F]or a period of more than four years," with their full knowledge and acquiescence, those customers acquired goods pursuant to "the [grocer's] system of keeping the account." *Id*. The customers never "protested or desired that the particular items purchased and their corresponding price be noted in detail in the [grocer's] sales pads." *Id*. Rather, "[i]t was only after the [grocer] refused to extend further credit and brought suit on the indebtedness that [the customers] sought the obviously impossible—to require the [grocer] to specify the individual items upon which the account was based." *Id*.

¶33 In contrast, this case does not involve any similar, long-term course of conduct between the parties. Nor was it "obviously impossible" for the Evertses to have complied with the clear directive of Esperero's CC&Rs by obtaining prior, written approval from ECHA's board before recording their private covenant. *Id.* In short, *Holmes* is quite distinguishable and not helpful to the Evertses' position.

¶34 On the other hand, though not cited by the parties, *Camelback Del Este Homeowners Ass'n v. Warner*, 156 Ariz. 21, 749 P.2d 930 (App. 1987), is analogous and counters the Evertses' argument. There, this court affirmed a trial court's ruling that the plaintiff/homeowners association was not estopped from enforcing restrictive covenants against a property owner/developer. *Id*. at 26, 749 P.2d at 935. In arguing estoppel, the

developer "assert[ed] that no resident stated that they intended to enforce the restrictions and that had any homeowner informed [him] of such intent," he would have acted differently by "amend[ing] [his] rezoning application." *Id*. at 23, 749 P.2d at 932. At all pertinent times, however, the developer "was aware of the deed restrictions of the subdivision." *Id.* In rejecting the developer's argument that the homeowners association was "estopped from enforcing the covenants by virtue of its failure to timely manifest opposition to [his] project," *id*. at 24, 749 P.2d at 933, this court stated:

> "[A] correlative essential element of estoppel is that one seeking its protection must have lacked knowledge, and the means of acquiring knowledge, of the facts relied upon. A party's silence will not operate as an estoppel against it where the means of acquiring knowledge were equally available to both parties."

Id. at 26, 749 P.2d at 935, *quoting Honeywell, Inc. v. Arnold Constr. Co.*, 134 Ariz. 153, 158, 654 P.2d 301, 306 (App. 1982).

¶35 Here, the record does not reflect, nor do the Evertses argue, that they "lacked knowledge" or "the means of acquiring knowledge" of the requirements in Esperero's CC&Rs. *Id*. As noted earlier, the Evertses expressly referred to those CC&Rs in their private covenant, and the record does not reflect that Engle ever said or did anything to suggest that the CC&Rs were inapplicable to the Evertses or that he would not use them to challenge the validity of Evertses' covenant should a dispute arise on its meaning or effect. "[F]or silence to constitute an estoppel, there must have been some duty to speak." *Honeywell*, 134 Ariz. at 158, 654 P.2d at 306. The Evertses have neither alleged nor established any such duty. Therefore, Engle's mere "silence will not operate as an estoppel

against [him] where the means of acquiring knowledge were equally available to both parties." *Id*.[6]

¶36 Because the Evertses failed to establish the first element of equitable estoppel—a prior affirmative act by Engle inconsistent with his CC&R-based defense and counterclaim—the trial court erred in granting summary judgment in favor of the Evertses on the estoppel issue. And, for many of the same reasons discussed above, the Evertses also failed to establish the second prerequisite for estoppel—justifiable reliance. "The doctrine of equitable estoppel is not applicable unless one is injured by justifiably relying upon conduct of another intended to induce such reliance." *Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 78, 847 P.2d 117, 123 (App. 1992). Additionally, "equitable estoppel not only requires that a person show he or she relied upon another's conduct but that, as a result of such reliance, the person changed his or her 'position for the worse.'" *Sherman v. First Am. Title Ins. Co.*, 201 Ariz. 564, ¶ 19, 38 P.3d 1229, 1235 (App. 2002), *quoting Heltzel v. Mecham Pontiac*, 152 Ariz. 58, 60, 730 P.2d 235, 237 (1986). Generally, "[q]uestions of estoppel, including reasonable reliance, are

[6]*See also Roscoe-Gill v. Newman*, 188 Ariz. 483, 486, 937 P.2d 673, 676 (App. 1996) (rejecting plaintiff's equitable estoppel claim when "there [was] no evidence in the record that [defendant] made affirmative misrepresentation of present fact when he requested extensions of the closing date" on sale to which he had previously agreed); *cf. Thomas & King, Inc. v. City of Phoenix*, 208 Ariz. 203, ¶ 27, 92 P.3d 429, 436 (App. 2004) ("The essence of estoppel is conduct inconsistent with a later-adopted position."); *Bauer v. P.A. Cutri Co.*, 253 A.2d 252, 255 (Pa. 1969) (seller of business not equitably estopped from claiming payment owed by buyer even if seller did not inform buyer of debt or make claim on it until after sales transaction completed, and even if buyer purchased business "in the belief that the claim did not exist"; it was buyer's "own fault that he did not at least investigate whether [debt] had indeed been paid").

fact-intensive inquiries," *John C. Lincoln Hosp. & Health Corp.*, 208 Ariz. 532, ¶ 10, 96 P.3d at 535; *see also Shell W. E&P, Inc. v. Bd. of County Comm'rs*, 923 P.2d 251, 254 (Colo. App. Ct. 1995) ("reasonable reliance giving rise to equitable estoppel [is] question[] of fact").

¶37 With respect to this second element of equitable estoppel, in his affidavit below, Charles Everts averred that Engle's purchase "subject to the building restrictions of the Covenant was an essential part of the deal to [the Evertses]" and that they "would not have sold Lot 16 to Engle without his acceptance of the terms of the Covenant." That evidence is unrefuted and adequately supports the trial court's implicit ruling that the Evertses sold the property to Engle in reliance on his having had notice of the covenant and his future compliance with its terms. The trial court found that the Evertses had "relied on Engle's acceptance of the terms of the Covenant when they sold the Lot to [him]." Engle does not argue otherwise.

¶38 Nonetheless, absent any act or statement by Engle repudiating Esperero's CC&Rs, we find unjustified the Evertses' reliance on his mere purchase of Lot 16, albeit without expressly objecting to the private covenant, to preclude him from later seeking to invalidate it. Again, nothing Engle said or did in connection with his purchase of the property justified any reliance or belief on the Evertses' part that he would not resort to Esperero's CC&Rs to protect or preserve his interests. "Resulting reliance must be justifiable." *Flying Diamond Airpark*, 215 Ariz. 44, ¶ 28, 156 P.3d at 1155. Neither the

record nor the law establishes that the Evertses' reliance here was justified so as to estop Engle from challenging the covenant based on the CC&Rs.

¶39 For all of these reasons, the trial court erred in granting summary judgment in favor of the Evertses on their equittable estoppel theory of defense to Engle's counterclaim.[7] Under the circumstances presented here, Engle is not estopped from relying on the CC&Rs, the plain terms of which declare the Evertses' covenant null and void. Accordingly, we do not address the parties' various arguments on the scope, meaning, and effect of the Evertses' covenant and whether it precludes some aspects of Engle's constructions plans and actions on the property. Nor do we address Engle's argument that the trial court erroneously construed and misapplied *Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006).

IV.

¶40 This, however, does not end our analysis. Engle also moved for summary judgment below and argues the trial court erred in denying his motion. Therefore, Engle asserts, this court should direct entry of summary judgment in his favor.

¶41 A trial court's denial of a motion for summary judgment "is neither appealable nor generally subject to review on appeal from a final judgment." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 7, 965 P.2d 47, 50 (App. 1998); *see also Martin v. Schroeder*, 209 Ariz. 531, ¶ 5, 105 P.3d 577, 579 (App. 2005). But we may consider the merits of a losing party's cross-motion when no genuine issue of material fact exists and that party is

[7]Having found the first two elements of equitable estoppel lacking here, we need not address the third element—whether the Evertses were prejudicially injured by Engle's alleged repudiation of any prior conduct.

entitled to judgment as a matter of law. *Bothell*, 192 Ariz. 313, ¶ 7, 965 P.2d at 50; *see also In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 16, 32 P.3d 39, 44 (App. 2001).

¶42 In his motion for summary judgment below, Engle argued the Evertses' covenant is null and void because of their failure to comply with the preapproval requirement in Esperero's CC&Rs. For the reasons discussed above, Engle is not equitably estopped from so arguing, and we agree with him that the plain language of the CC&Rs renders Evertses' covenant legally ineffective and unenforceable. Therefore, the trial court erred in denying Engle's motion for summary judgment on that issue unless the Evertses can ultimately prevail on one of their other arguments, to which we now briefly turn but, for reasons discussed below, do not resolve.

¶43 In their pleadings and motion papers below, the Evertses also raised other theories that were neither disposed of by the trial court nor argued by either side on appeal. First, the Evertses argued that Engle waived any right to rely on Esperero's CC&Rs by purchasing Lot 16 with actual notice of the private, recorded covenant on that property. In opposing Engle's motion below, the Evertses asserted, "the facts present a jury question on the issue of whether [Engle's] actions constituted conduct that warrants an inference of an intentional relinquishment of the right to rely" on the CC&Rs. *See Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 581, 892 P.2d 1365, 1370 (App. 1994) ("Waiver occurs when a party relinquishes a known right or exhibits conduct that clearly warrants inference of an intentional relinquishment."); *see also In re Noel R. Shahan Irrevocable & Intervivos Trust*, 188 Ariz. 74, 78, 932 P.2d 1345, 1349 (App. 1996). Although Engle denied any

such waiver, he also acknowledged below that the Evertses' waiver theory is based on factual issues, resolution of which often is inappropriate for summary judgment.

¶44 Generally, "[w]hether a right has been waived is a question of fact for the trial court." *N. Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 476, 702 P.2d 696, 705 (App. 1984); *see also Goglia v. Bodnar*, 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987); *but cf. Burke*, 207 Ariz. 393, ¶ 27, 87 P.3d at 87. Because the trial court ruled against Engle based on equitable estoppel, it did not address or rule on the Evertses' waiver theory. Absent any such ruling or any briefing and argument on the issue in this court, "[w]e find that it would be inappropriate to address these issues when the trial court has not considered them in the first instance." *Stewart v. Mut. of Omaha Ins. Co.*, 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991); *see also Williams v. Baugh*, 214 Ariz. 471, n.3, 154 P.3d 373, 376 n.3 (App. 2007); *Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, n.2, 62 P.3d 966, 970 n.2 (App. 2003); *Mora v. Phoenix Indem. Ins. Co.*, 196 Ariz. 315, ¶ 26, 996 P.2d 116, 122 (App. 1999).[8]

¶45 Second, the Evertses alleged and argued below that if Engle were permitted to invalidate their covenant based on Esperero's CC&Rs, they are entitled to rescind their

[8]The Evertses also argued below that ECHA had waived any right to invoke or enforce against them the preapproval requirement in Esperero's CC&Rs because ECHA previously had neglected to enforce that provision or otherwise object to several restrictive covenants recorded on other Esperero lots when no prior Board approval had been sought or obtained for the covenants. In its ruling, the trial court referred to that argument and some of the evidence relating to it but did not expressly rule on the issue. For that reason, and because ECHA is not a party to this action, we do not address any waiver argument against it.

sale of Lot 16 to him. According to the Evertses, if Engle is now able to avoid or nullify their covenant, there is a failure of consideration and frustration of purpose, entitling them to rescission. *See 7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc.*, 184 Ariz. 341, 345-51, 909 P.2d 408, 412-18 (App. 1995); *see also Mortensen v. Berzell Inv. Co.*, 102 Ariz. 348, 350, 429 P.2d 945, 947 (1967). The trial court did not address or rule on that issue, nor have the parties briefed or argued it on appeal. Accordingly, as with the Evertses' waiver defense, we do not address their rescission claim and express no opinion on the merits or ultimate resolution of those issues. *See Stewart*, 169 Ariz. at 108, 817 P.2d at 53.

Attorney Fees

¶46 Both parties request an award of attorney fees on appeal pursuant to A.R.S. § 12-341.01(A). Because neither party has prevailed on the merits of the underlying claims, we deny both parties' requests. *See Nestle Ice Cream Co. v. Fuller*, 186 Ariz. 521, 525-26, 924 P.2d 1040, 1044-45 (App. 1996). A party may receive fees for a reversal of summary judgment if the appeal is a "separate unit," but that is not clearly the case here. *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 393-94, 710 P.2d 1025, 1048-49 (1985).

Disposition

¶47 For the reasons stated above, the trial court's grant of summary judgment in favor of the Evertses is vacated, including the court's ruling that Engle is equitably estopped from challenging the Evertses' covenant based on Esperero's CC&Rs. The case is remanded to the trial court for further proceedings consistent with this decision.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge